IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

MONDAY, THE 24TH SEPTEMBER 2007 / 2ND ASWINA 1929

CRL.A.No. 19 of 2003()

CC.48/2002 of JUDL.MAGISTRATE OF FIRST CLASS-III, KANNUR

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APPELLANT: COMPLAINANT:

M. RAGHAVAN NAMBIAR, S/O. RAGHAVAN NAMBIAR, MAVILA, ANNUR, NELLUR VILLAGE, PAYYANNUR.

BY ADV. SRI.PHILIP M.VARUGHESE

RESPONDENTS: ACCUSED AND STATE:

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1. ASHRAF, BADARIYA CUT PIECE CENTRE, NEAR BUS STAND, PAYYANNUR.

2. THE STATE OF KERALA, REPRESENTED BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

BY ADV. SRI.C.MURALIKRISHNAN (PAYYANUR)-R1
PUBLIC PROSECUTOR SRI. PUZHAKKARA MOHAMMED - R2

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 24/09/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.THANKAPPAN, J.

CRL. APPEAL NO. 19 OF 2003

Dated this the 24th day of September, 2007

JUDGMENT

This appeal is filed against the judgment in C.C. No.48 of 2002 on the file of the Judicial First Class Magistrate's Court III, Kannur.

2. The appellant filed the complaint before the court below alleging that the first respondent - accused committed offence punishable under Section 138 of the Negotiable Instruments Act, 1881. The court below took cognizance of the complaint, served notice on the accused and posted the case to 2.7.2002. On 2.7.2002, finding that the complainant was absent, the trial court acquitted the accused under Section 256(1) Cr.P.C.

3. This Court heard the learned counsel appearing on either side.

4. Learned counsel appearing for the appellant submits that originally the complaint was filed before the Judicial First Class Magistrate's Court, Payyannur and subsequently the case was made over to

the Judicial First Class Magistrate's Court III, Kannur. Learned counsel submits that though the transfer of the case was notified on the notice board, it was without notice to the counsel appearing for the appellant in the trial court and that the clerk of the counsel also failed to note the same. Counsel further submits that the posting of the case was also without notice to the appellant and hence, the appellant - complainant could not appear before the trial court.

5. A reading of the impugned order would show that the learned trial Magistrate had not complied with the dictum laid down by this Court in the decisions reported in **Don Bosco v. Partech Computers, 2005(2) K.L.T. 1003** and **G.F.S. Chit & Loans (P) Ltd. v. Rajesh, 2006(3) K.L.T. 825.** In the above two judgments, this Court had categorically held that unmerited disposal of complaints will affect dispensation of justice. Further, the Apex Court in the decision reported in **Associated Cement Co. Ltd. v. Keshvanand, 1998(1) K.L.T. 179 (SC)** held that on order under Section 256(1) Cr.P.C. shall be passed only under the following circumstances:

> "First is, if the court thinks that in a situation it is proper to adjourn the hearing then the magistrate shall not acquit the accused. Second is, when the magistrate considers that personal attendance of the complainant is not

> necessary on that day the magistrate has the power to dispense with his attendance and proceed with the case. When the court notices that the complainant is absent on a particular day the court must consider whether personal attendance of the complainant is essential on that day for the progress of the case and also whether the situation does not justify the case being adjourned to another date due to any other reason. If the situation does not justify the case being adjourned the court is free to dismiss the complaint and acquit the accused. But if the presence of the complainant on that day was quite unnecessary then resorting to the step of axing down the complaint may not be a proper exercise of the power envisaged in the section. The discretion must therefore, be exercised judicially and fairly without impairing the cause of administration of criminal justice."

6. In the above circumstances, this Court is of the view that the order of the trial court is liable to be set aside. The impugned order is accordingly set aside and the matter is remanded to the trial court for fresh disposal as per law.

The Crl. Appeal is allowed by way of remand. The parties shall appear before the trial court on 17.11.2007.

(K.THANKAPPAN, JUDGE)

sp/

K. THANKAPPAN, J.

CRL.A. NO.19/2003

JUDGMENT

24th SEPTEMBER, 2007